IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 3 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO,
Libellee - Petitioner,
PURE FOOD MANUFACTURING COMPANY,
Claimant - Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MISCELLANEOUS

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To The Honorable, The Chief Justice of The United States, and to The Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit which reversed the judgment of the United States District

Court for the District of New Mexico, and sustained the libel of information instituted by the United States of America under 21 U.S.C. Sec. 341, against 62 Cases, More or Less, Each Containing Six Jars of Jam, Assorted Flavors, Net Wt. 5 Lbs., 3 Oz., shipped by the Pure Food Manufacturing Company.

OPINIONS BELOW.

The majority opinion of the Court of Appeals appears in the record (R. 57) and if officially reported in 183 F. 2d 1014; the dissenting opinion also appearing in the record (R. 64) is officially reported in 183 F. 2d 1014, 1016. The opinion of the District Court also appears in the record (R. 25) and is reported in 87 F. Supp. 735.

JURISDICTION.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on June 27, 1950. (R. 67) Thereafter, on July 15, 1950, and within the time allowed therefor, a petition for rehearing (R. 67) was filed which was denied on July 22, 1950. On July 17, 1950, the respondent, the United States of America, filed a "Suggestion for Modification of Opinion" (R. 74) which was denied on July 22, 1950. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED.

Whether "imitation jam" labeled as an "imitation" food in conformity with the provisions of 21 U.S.C. 343 (c) is subject to seizure as a misbranded food under 21 U.S.C. 343 (g) if said "imitation jam" fails to meet the definition and standard of identity for pure fruit jam.

STATUTES INVOLVED.

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of 1938 (52 Stat. 1040, 21 U.S.C. 301) are as follows:

21 U.S.C. 334 (a). Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *. (52 Stat. 1044)

21 U.S.C. 341. Whenever in the judgment of the (Federal Security) Administrator such action will promote honesty and fair dealing in the interest of the consumer, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, * * *. (52 Stat. 1046)

21 U.S.C. 343 (c). A food shall be deemed to be misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated. (52 Stat. 1047)

21 U.S.C. 343 (g). A food shall be deemed to be misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *. (52 Stat. 1047)

STATEMENT OF THE CASE.

The libel of information filed by the United States of America in the United States District Court for the District of New Mexico alleged that the food seized, namely, 62 cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs., 3 oz., was misbranded within the meaning of 21 U.S.C. 343 (g) when introduced and while in interstate commerce and while held for sale after shipment in interstate commerce, in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to 21 U.S.C. 341. The definitions and standards of identity for Fruit Preserves, 21 C.F.R. 29.0, pp. 81-84 (1949 ed.), provided that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and the soluble solids content of blackberry, strawberry and grape jam be not less than 68% and the apricot, peach and plum jam not less than 65%. The petitioner freely admitted that the jams under seizure contained 25% fruit and a 20% water solution of pectin.

The defense of the petitioner was that the products were properly labeled "imitation jam", and hence were sanctioned under the specific authority of 21 U.S.C. 343 (c).

The government contended that once standards of identification had been promulgated for pure fruit preserves, petitioner could no longer manufacture "imitation jams" even though the imitation products conformed to the requirements of 21 U.S.C. 343 (c). The government's position is that the "imitation jam" purported to be or was represented to be pure jam, and since the "imitation jam" did not meet the definitions and standards for pure fruit preserves, it was therefore misbranded under 21 U.S.C. 343 (g).

There is no contention whatsoever by the Government that the products seized are unwholesome or unfit for human consumption; indeed the lower court found that the articles seized had food value and were wholesome and in every way fit for human consumption. (Finding of Fact 5, R. 22) The good faith and integrity of the claimant in manufacturing and marketing the product seized was not and is not challenged in this case.

The trial court found that the "imitation jam" so seized was sold in interstate commerce without deception (Finding of Fact 17, R. 23); that the articles of food so seized purport to be and are represented to be "imitation fruit preserves," and purport to be nothing else and are represented as nothing else. (Finding of Fact 16, R. 23)

The trial judge, the Honorable Carl A. Hatch, former United States Senator from the State of New Mexico and a member of Congress during the period of the enactment of the Food, Drug, and Cosmetic Act of 1938, held:

> "the product in question is an imitation of another food. It does not pretend to be anything else. . .
>
> "Any person reading sub-section c [343 (c)] and even in connection with sub-section g [343 (g)] would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word "imitation" and immediately after the name of the food imitated, such food so labeled would not be misbranded. . .
>
> "If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seek only to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction." (R. 26, 27)

The majority opinion of the Court of Appeals for the Tenth Circuit, without even discussing either the evidence adduced or the finding of fact of the trial court that the product seized purported to be and was represented to be "imitation jam," and purported to be and was represented to be nothing else (finding of Fact 16, R. 23), reversed the decision of the trial court and instead held that the food seized purported to be pure fruit preserves, and hence was misbranded. (R. 62, 63)

The majority of the Court, however, in their anxiety to answer the arguments of the dissenting opinion and in a firm belief that the product should be allowed the channels of interstate commerce stated:

> "the manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin." (R. 63)

The dissenting judge would have affirmed the trial court on the grounds that since the food was labeled "imitation" in conformity with 21 U.S.C. 343 (c), to declare the food misbranded would render section 343 (c) meaningless. (R. 66)

The dissenting opinion concludes as follows:

> "A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the same, which will mean virtually a standardization of the prices. It will remove from the market a nutritious and wholesome food which sells for approximately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court." (R. 67)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the seized articles of food were misbranded.

(2) In failing to give weight to the plain ordinary meaning of the word "imitation" on the labels of the seized articles.

(3) In failing to consider the intent of the Congress of the United States to sanction "imitation" foods in interstate commerce.

(4) In disregarding the finding of the trial court that the articles of food seized purport to be and are represented as "imitation fruit preserves" and purport to be nothing else and are represented as nothing else.

(5) In failing to consider that for many years the official position of the Food and Drug Administration was that products similar to those seized in this case *must* be labeled and marketed as "imitation jam."

(6) In stating that the product seized could be marketed as "syrup and fruit thickened with pectin, or syrup flavored with fruit and thicked with pectin."

(7) In attempting to apply *Federal Security Administration v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C.A. 2), and *United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10) to the instant case.

(8) In enforcing the seizure provisions, 21 U.S.C. 334, against food products which were not misbranded "while held for sale after shipment in interstate commerce."

(9) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The questions presented in this case are indeed novel and unique and are questions not previously determined by either this or any other court. Obviously then, there are no conflicting decisions to induce this Honorable Court to grant the writ. These questions are therefore ones of first impression.

The questions here before the court were drawn up by the Government in what had been hoped would be an ideal factual background for the determination of the question of whether or not "imitation jams" conforming to 21 U.S.C. 343 (c) marketed in the channels of interstate commerce could be seized as misbranded under 21 U.S.C. 343 (g) once Definitions and Standards of Identity had been established for fruit preserves. To the Government, this case was to be a test case to determine this question so important not only to the many manufacturers of "imitation" foods throughout the country but also to the millions of consumers of "imitation jams" who are purchasing a wholesome food product at half the price of pure fruit jams. (Finding of Fact 13, R. 23)

The best efforts of the Government and the petitioner have obviously gone astray. To allow the majority opinion of the Court of Appeals for the Tenth Circuit to stand as the law on this most important subject would be to throw the whole "imitation" question into such confusion as existed prior to the passage of the Food, Drug, and Cosmetic Act of 1938, and to recognize the existence of a type of labeling that the 1938 Act had, up to the rendering of the decision by the Court of Appeals, specifically eliminated.

Both petitioner and respondent recognized the grave peril occasioned by the majority opinion, and in an unprecedented action both parties to the litigation petitioned the Court for the removal of its unfortunate language.

The petitioner filed a motion for rehearing. (R. 67) The Government filed a "Suggestion for Modification of Opinion" (R. 74) to achieve the same result. Both petition for rehearing and "Suggestion for Modification of Opinion" were denied.

The language of the majority opinion of the Court of Appeals which will wreak such confusion and chaos on the Food and Drug Administration, the manufacturers of food products, and the consuming public is quoted in full as follows:

> "It is urged that the effect of our decision will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, (Sen. Rep. 361, 74th Congress, 1st Sess., p. 8) shows the Congress did not intend the operation of 343 (g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name fruit jam and in such a manner that it purports to be, or is represented to be fruit jam." (R. 63)

This Honorable Court can easily imagine the confusion to the consuming public in purchasing from a grocer's shelf a food labeled "strawberry syrup and fruit thickened with pectin."

The Congress of the United States and the Food and Drug Administration, operating under the Former Food and Drug Act of 1906, had experienced confusion to the consuming public similar to that invited by the Court of Appeals in the instant case.

Prior to the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, a product was marketed labeled "Bred-Spred." This product resembled pure fruit jam,

purported to be and was represented as pure fruit jam. And yet the product contained less than one-half the amount of fruit required by the customary standards of the trade for fruit jam. Although containing less costly ingredients, "Bred-Spred" sold at a price only slightly less than the price for products containing the requisite amount of fruit.

The Government instituted proceeding against "Bred-Spred." The defense of the product rested on Section 8 of the Food and Drug Act of 1906, 34 Stat. 771, 21 U.S.C., 10, which provided in part as follows:

> "Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> "First. In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

The Court held that "Bred-Spred" since it did not contain any "poisonous" or "deleterious" ingredients was not misbranded by authority of the distinctive name provision of the statute quoted above. *United States v. Ten Cases, More or Less, "Bred-Spred,"* 49 F. 2d 87 (C.A. 8).

Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, in an appearance be-

fore a subcommittee of the Senate Committee on Commerce on December 7, 1933, stated as follows:

> "The Bill S. 1944 (which with amendments not pertinent to this argument became the Food, Drug, and Cosmetics Act of 1938) as framed eliminates that objectionable provision of the act which makes it possible, by the employment of some fanciful designation like the term 'Bred-Spred' to market a product under the legal assurance that it will be subject to none of the prohibitions of the act as applied to all types of foods and drugs, with the single exception that it must contain no added poisonous ingredients," Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1052.

Although the "imitation" section of the 1906 Act was retained as 21 U. S. C. 343 (c), the Federal Food, Drug, and Cosmetic Act of 1938, deleted the distinctive name provision of the 1906 Act in an attempt to eliminate the apparent dangers of the "Bred-Spred" case. As a result of the enactment of the 1938 Act, up until the institution of this action, only standard and imitation food products were sanctioned in interstate commerce.

In the opinion of petitioner, however, the majority opinion has once more opened the door to confusion and misrepresentation by sanctioning products in interstate commerce labeled "Grape syrup flavored with fruit and thickened with pectin." The abuses and impositions that an unscrupulous manufacturer could inflict on the consuming public as a result of this decision are too apparent to merit further consideration.

The petitioner and the Government have joined together in this test case upon an honest difference of opinion as to meaning and effect of the "imitation" provision of the 1938 Act. The petitioner has marketed its products without deception; its good faith has not been challenged by the Government. The petitioner, moreover, is reluctant to see the years of toil on the part of the Con-

gress of the United States, the officials of the Food and Drug Administration, and attorneys, chemists, and manufacturers interested in the administration of the Food and Drug Laws for the benefit of the consuming public go for naught.

The petitioner is marketing a product which is labeled in conformity with 21 U.S.C. 343 (c), and which purports to be and is represented as imitation fruit preserves and purports to be nothing else and is represented as nothing else. (Finding of Fact 17, R. 23) Petitioner has refused the obvious invitation of the Court of Appeals to market its product under a fanciful label as suggested by the court because it firmly believes that the marketing of a product under such a label would lead only to confusion of the consuming public.

The position of the petitioner as to the language of the majority opinion is also shared by the Government. The concern of the Government that the language of the majority opinion above-quoted will prove to be a grave hindrance to the effective administration of the food provisions of the Federal Food, Drug, and Cosmetic Act of 1938 is apparent from the following language contained in the Government's Suggestion for Modification of Opinion:

> "It (the language of the majority opinion) may be misconstrued so as to support a contention which would place the consumer in a most disadvantageous position, and render null and void one of the most important and salutary provisions inserted in the Federal Food, Drug, and Cosmetic Act for the specific purpose of remedying a serious weakness in the predecessor Food and Drugs Act of 1906." (R. 74)

If, however, this Honorable Court should deny this writ, the petitioner would have no other alternative than to label and market its product in conformity with the opinion of the Court of Appeals for the Tenth Circuit.

Undoubtedly seizure by the Food and Drug Administration would immediately follow. Again the petitioner would be forced to defend its position at great expense. And again this Honorable Court, within the next few years, would be asked to hear the legal problems presented by this case. In the interval the interpretation and enforcement of the "imitation" section of the 1938 Act, 21 U.S.C. 343 (c), would stay in a chaotic condition. Litigation on this question would become widespread, and manufacturers, consumers, and the Government will all be in desperate need of the determination of this vital question of food law by this Honorable Court.

The unfortunate language of the majority opinion is, however, only one of several reasons for urging the granting of this writ. For 15 years last past, the petitioner has manufactured, labeled, and marketed its products in accordance with, not only his understanding of the meaning and intent of 21 U.S.C. 343 (c), but also the official interpretation of that section by the Federal Food and Drug Administration. The Food and Drug Administrator in two directives approved the theories advanced by petitioner and upon which petitioner relied in developing and marketing his product. In his Trade Correspondence No. 151 issued March 7, 1940, the Food and Drug Administrator stated that a manufacturer should produce an article conforming strictly to the standards for "Tomato Puree." "The only other alternative which in our opinion would insure a legal article (although not conforming to the standard) would be to label your present product '*Imitation* Tomato Puree'" (italics ours) Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act*, pages 627-628.

Likewise the Food and Drug Administrator stated in his Trade Correspondence issued April 17, 1941, that a mixture of strawberries, apple juice, and sugar, although substandard "will simulate the appearance and flavor of a

strawberry jam, and in our opinion, should be labeled as an imitation jam under section 403 (c) [343 (c)] of the Act." Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act,* page 712.

Prior to the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, petitioner labeled and marked his product as "compound jam." At the request of the Denver Station of the Food and Drug Administration, after the passage of the 1938 Act, the petitioner changed his label from "compound jam" to "imitation jam." Subsequently, the petitioner has spent large sums of money in developing a market for his product based on labels and marketing practices suggested by the Government. Petitioner has conscientiously, in good faith, developed a wholesome, nutritious, and pure food product which sells in a competitive market at approximately one-half the cost of pure fruit preserves. The failure of this Honorable Court to review the decision of the Court of Appeals would result in great loss, not only in income, but capital expenditures made by Petitioner in compliance with the directives of the Food and Drug Administrator and his appointed officers.

As the trial judge stated in his opinion:

> "Claimant has sought to comply fully with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.
>
> "If the law-making branch of government desires this particular statute to be given the construction for which the government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate lan-

guage indicating the legislative intention to make it impossible to imitate an article of food for which definitions and standards have been established, appears in sub-section (c)." (R. 27)

Not only is the question herein presented of utmost importance to the Food and Drug Administration, the consuming public, and manufacturers, including the petitioner who has been innocently trapped by a swift change of mind on the part of the Administrator, but it is a question which should be decided by this Honorable Court to chart the first clear course on the law of "imitation foods."

Although the Government brought this action in an attempt to clarify for manufacturers, consumers, and the Government itself, the "imitation" section, 21 U.S.C. 343 (c), of the 1938 Act, the Court of Appeals for the Tenth Circuit failed to discuss the "imitation" section in the majority opinion. The language of that section is clear and unambiguous, namely that a food is not misbranded if it is an imitation of another food and its label bears in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated. In the case before the court, the food was an imitation jam, its labels bearing the words "imitation grape jam," etc., conformed to the requirements of Section 343 (c) and the interpretations of that section by Trade Correspondence of the Food and Drug Administrator. The majority of the court has sought to repeal the imitation provision by judicial action without so much as a single mention of that section. This judicial repeal is attempted in the face of the clear intent of the Congress of the United States to sanction "imitation" foods in interstate commerce.

The majority opinion erred in refusing to consider the legislative intent of Section 343 (c). As stated above, one of the chief aims of Congress in enacting the new food and drug law was to eliminate the "distinctive name"

provision of the 1906 Act and eliminate the dangers that developed as a result of the Bred-Spred case. The "distinctive name" provision, 21 U.S.C. 10, was eliminated, but the imitation provision was retained as 21 U.S.C. 343 (*c*).

The Congress and the Food and Drug Administration made it clear that the 1938 Act sanctioned "imitation" foods in interstate commerce. Mr. Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, appearing before a subcommittee of the House Committee on Interstate and Foreign Commerce, considering Senate Bill No. 5 of the 74th Congress, expounded the official philosophy of his department on this question as follows:

> "Mr. Campbell: If there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consistency make preserves. That has been the common-law standard or the trade custom on the part of manufacturers throughout time.
>
> "But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. *** But that product is not labeled as a preserve. It is labeled as bread spread. But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for.***
>
> "There is fruit, sugar, and a pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted.***

"Mr. Chapman: What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell: Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

"Mr. Chapman: That would be shown on the label?

"Mr. Campbell: It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. *There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.* (Italics ours)

There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." Dunn, *Federal Food, Drug and Cosmetic Act,* Pages 1238-1239.

This philosophy as expressed by Mr. Campbell was carried over in the final draft of the Federal Food, Drug, and Cosmetic Act as Section 343 (c). If the consumer knew what he was buying (and he was buying it at one-half the cost of pure fruit preserves) by reason of the label bearing the word "imitation," there can be no objection to an article with a deficiency in fruit.

United States Senator Royal S. Copeland of the State of New York in whose honor the Federal Food, Drug, and Cosmetic Act of 1938 is commonly referred to as the Copeland Act, rejects the theory advanced by the Government in this case by saying:

"It should be noted that the operation of this provision [Section 343 (g)] will in no way interfere with the marketing of any food which is wholesome

but *which does not meet the definition and standard*, or for which no definition and standard has been provided, but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation." (Italics ours.) Dunn, *Federal Food, Drug, and Cosmetic Act*, pg. 246.

The intent of Congress on the "imitation" question is clear; the language of Section 343 (c) is not ambiguous. If Congress had intended to eliminate imitation foods, it had clear and unequivocal language in the drug sections of the act to use as a guide. 21 U.S.C. 352 (i) (2) provides in part as follows:

> "A drug or device shall be deemed to be misbranded . . . . if it is an imitation of another drug."

If Congress had intended to eliminate "imitation" food, it would have only had to borrow the words of Section 352 (i) (2) to achieve said result.

The Court of Appeals, in view of the clear intent of Congress and the obvious meaning of Section 343 (c), cannot amend by judicial act the Federal Food, Drug, and Cosmetic Act of 1938 to eliminate "imitation" foods from interstate commerce. Statutory amendment must be made by the Congress and not by the lower courts, and therefore this Honorable Court should grant this petition to prevent such a judicial amendment.

The Government has contended throughout this case that the case of *Federal Administrator v. Quaker Oats Company*, 318 U. S. 218, 87 Law. Ed. 724, is controlling authority to sustain its position. In the opinion of the petitioner, the Quaker Oats case is not of the slightest authority for the Goverment's position, and this Court should review the instant case to harness the Quaker Oats case to the realm of food law to which the Court originally had directed its attention.

Nowhere in the Quaker Oats case is the question of "imitation" discussed; the articles in question were not labeled "imitation." That case is authority for the proposition that once definitions and standards of identity have been promulgated, deviations will not be tolerated by the device of truthful labeling and nothing more. Nowhere in the opinion is the "imitation" provision [343 (c)] discussed. The Government is attempting to push its current but fluctuating interpretation of the Federal Food, Drug, and Cosmetic Act far beyond the intended scope of the Quaker Oats case.

The attempt of the Government to advance a strained and foreign interpretation of *Federal Administrator v. Quaker Oats Company, supra*, and similar cases *Libby, McNeill, & Libby v. United States*, 148 F. 2d 71 (C.A. 2), and *United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10) should be curbed by a review by this Court of the extremely important issues presented in this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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